Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-532

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A.J. TAYLOR, its Secretary,

Petitioners,

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,

Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHAW & WARNER
Suites 607 & 611
New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone (305) 374-2633

Counsel for Respondents

INDEX

	PAGE
Table of Authorities	ii
Questions Presented for Review	1
Parties to the Proceeding	2
Statement of the Case	2
Reasons for Disallowance of the Writ	8
Conclusion	17
Certificate of Service	20

CITATIONS

	PAGE
Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)	7, 9, 12, 15, 16, 17
McCall v. U.S., 338 F.2d 589 (9th Cir. 1964), cert. denied 380 U.S. 974	13
Murphy v. Kodz, 351 F.2d 163 (9th Cir. 1965)	13
Scott v. Board of Supervisors, 336 F.2d 557 (5th Cir. 1964) .	9
Smith v. Reeves, 178 U.S. 436 (1900)	9
Stapelton v. Two Million-Four Hundred Thousand, One-Hundred and Ten Dollars 454 F.2d 1210 (3rd Cir. 1972), cert. denied 380 U.S. 974 . . .	13
Vans Agnew v. Ft. Meyers Drainage District, 69 F.2d 244 (5th Cir. 1934), cert. denied 292 U.S. 643	10

CONSTITUTIONS and STATUTES

	PAGE
U. S. Constitution: Amendment XI	1, 7, 8, 11, 12, 15, 17
Article VI	14
Florida Constituion: Article X, Sec. 13	8
28 U.S.C. sec. 1346	13
42 U.S.C. 1396(a)(13)(E) sec. 249, P.L. 92-603	3, 16
45 C.F.R. sec. 205.100(a)(2)(ii) sec. 409.055 Fla. Stat.	11
45 C.F.R. sec. 250.30(a)(3)(iv)	4

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the State of Florida waived its Eleventh Amendment Immunity from suit in Federal Court by expressly inserting in its rule adopted, written Medicaid provider agreement that the State would recognize and abide by all federal laws, regulations and guidelines applicable to participation in and administration of the Title XIX joint Federal-State Medicaid Program?

II.

Whether a Federal Court in an action with a federal party defendant, has jurisdiction to determine the constitutional validity of a federal regulation even though a necessary State defendant has been named, and whether the Federal Court has the power to fully enforce its judgment against all

defendants including the necessary State defendant, notwithstanding the Eleventh Amendment?

PARTIES TO THE PROCEEDING

The parties are the Golden Isles Convalescent Center and other nursing home providers situate in the State of Florida individually and as part of a class, the Secretary of the Federal Department of Health and Human Services, and the petitioning Secretary of the State of Florida Department of Health and Rehabilitative Services.

STATEMENT OF THE CASE

In 1972, the Congress of the United States enacted Public Law 92-603, §249,

42 U.S.C. § 1396(a)(13)(E) which provided that:

> 42 U.S.C. sec. 1396a(a)(13)(E); Sec. 249, P.L. 92-603
>
> Sec. 1396a. State Plans for medical assistance--Contents
> (a) A State plan for medical assistance must--
> (13) provide--
> (E) effective July 1, 1976, for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary. (Emp. added)

This four year congressionally mandated delay in the implementation of a reasonable cost-related reimbursement plan was expressly intended to give the states ample forewarning and time to properly prepare for this form of reimbursement. Despite Congress' clear mandate, and despite the more-than-reasonable time to prepare, the Federal Department of Health and

Human Services promulgated and adopted an obviously invalid federal regulation providing that the Federal Department of Health and Human Services would not require the States to adopt a reasonable cost-related reimbursement plan until January 1, 1978.[1]

Accordingly, the Plaintiff - Respondent, Golden Isles Convalescent Center, et al., filed this federal law suit in October, 1976, to declare the federal reg-

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[1] 45 C.F.R. Sec. 250.30 (a)3(IV) which provided: The State plan shall set forth the methods and standards used by the State to determine reasonable cost-related payment rates, and shall set payment rates on the basis of such methods and standards, to be effective no later than January 1, 1978.

ulation unconstitutional and to further order the federal defendant to perform its statutory duty to make certain that the State of Florida was in compliance with Federal Medicaid Reimbursement law. As a necessary requirement of this federal law suit, against a federal defendant involving a federal question in a joint federal-state program, the State of Florida, Department of Health and Rehabilitative Services (DHRS), the single designated State agency for purposes of administration of the Medicaid program in Floirda, was named a party-defendant and was ordered to perform its lawful obligation to prepare and adopt a proper state medicaid plan approved by the federal defendant. Included in the Plaintiff's requests for relief, was a prayer that the defendants fully comply with the statutory require-

ment that as of July 1, 1976, all contracting Medicaid providers be reimbursed on a reasonable cost-related basis pursuant to a proper and lawful plan.

On October 18, 1977, the Honorable William M. Hoeveler of the United States District Court for the Southern District of Florida, ruled the federal regulation extending the date for implementation of a lawful cost-related reimbursement plan invalid.[2] The Court further ordered the federal defendant to certify to the Court whether the then current Florida Medicaid plan complied with federal reimbursement law. The federal defendant certified that it did not. Thereupon, the Court ordered the state defendant to submit a proper reimbursement plan to the federal defen-

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[2] That portion of the Order was not challenged on Appeal.

dant for review and approval. However, on July 7, 1978, the District Court denied reimbursement on a reasonable cost-related basis as of the July 1, 1976, the date of Congress' mandate on the theory that such relief constituted retroactive damages or "equitable relief" which was barred by the Eleventh Amendment. The District Court relied solely on this Court's five to four divided opinion in Edelman v. Jordan, 415 U.S. 651 (1974).

On appeal by the Plaintiffs - Respondents to the Fifth Circuit Court of Appeals on the issue of the denial of reasonable cost-related payments back to July 1, 1976, the Court unanimously reversed Judge Hoeveler and held that the State of Florida had expressly waived its Eleventh Amendment immunity via its statement in its rule adopted, written Medicaid Provider Agreement to recognize and abide

by federal law.

The State defendant is now petitioning the Court on this issue.

REASONS FOR THE DISALLOWANCE OF THE WRIT OF CERTIORARI

I.

Pursuant to Article X, Section 13 of the Florida Constitution, the Florida State Legislature enacted into law §409. 055 F.S. which provides that:

> BODY CORPORATE: The department is a body corporate and shall adopt and have a corporate seal. It shall have the power to contract and be contracted with, to sue and be sued in actions ex contracto, but not in torts, and to have and possess corporate powers for all purposes necessary to administer this chapter...

It is understood that this statutory authority alone, while clearly constituting a waiver of immunity in state courts, does not authorize a suit in Federal Court against

the State of Florida.[3]

However, the State of Florida did not stop there. Pursuant to its corporate authority, the State Department of HRS promulgated and lawfully adopted a Provider Agreement in its Medical Assistance Rules in Appendix I, Chapter 10C-7.06 Florida Administrative Code which expressly stated in the sixth paragraph of such Agreement that:

> Both the Provider and the Single State Agency hereby agree to recognize and abide by all State and Federal Laws, Regulations and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

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[3] See Smith v. Reeves, 178 U.S. 436 (1900); Scott v. Board of Supervisors, 336 F.2d 557, (5th Cir 1964); Edelman v. Jordan, 415 U.S. 651, 678, n.19 (1974)

In addition in the fourth paragraph of such rule-adopted provider contract, it states that:

> In instances of non-payment or underpayment conditions due to error(s) not attributable to Provider who has furnished nursing home services and care to persons properly certified and eligible, the Single State Agency shall make payment to the Provider upon receipt of properly completed claims documents.

As a condition precedent to participation in the Florida Medicaid program, the Plaintiff - Respondents in this proceeding entered into this provider agreement with the State of Florida. This rule and contract were drafted soley by the State and as such, if any ambiguity did exist, such ambiguity should be construed against the drafter.[4]

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[4] Vans Agnew v. Ft. Meyers Drainage District, 69 F.2d 244 (5th Cir 1934) cert. denied 292 U.S. 643 (1934)

It is of course true that a State participating in the Title XIX Medicaid program must comply with federal law. However, contrary to the position of the petitioner, 45 C.F.R. §205.100 (a)(2)(ii) (1977) does not require any such statement of compliance to be put in the provider agreement. Such statement of federal legal compliance as adopted by the Florida Department of HRS went way beyond what was necessary. The intent and meaning of the compliance statement can only logically be construed by this Court as included for the express purpose of waiving the State's Eleventh Amendment immunity in Federal Court. In addition, it should be noted that there is no limitation stated in the agreement that compliance with federal law would be limited strictly to substantive and not procedural law as well.

Therefore, the Fifth Circuit was correct when it held that the overwhelming implication of paragraph 6 in the Medicaid Provider Agreement is that the state defendant intended to expressly waive its Eleventh Amendment immunity.

II.

In Edelman v. Jordan supra, the question was whether the Illinois Department of Public Aid's administration of a joint Federal and State welfare program conformed to federal law or otherwise whether it was in conflict therewith. There was no federal regulation declared invalid. There was no federal defendant served. There was no federal statute with a date on it, and of course, there was no express waiver of Eleventh Amendment immunity in a written contract adopted by the State.

In this lawsuit, all of the above mentioned factors were present. This action began as a federal constitutional challenge to a federal regulation which was adopted by the Federal Department of Health and Human Resources. Needless to say, the federal government was clearly an essential party to this litigation thus establishing the Federal Court as the proper forum within which to bring this action.[5]

Since the Florida Department of HRS was the single designated State Agency

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[5] Title 28 U.S.C. §1346 vests exclusive original jurisdiction in the District Court where the United States is a defendant. Stapelton v. Two-Million Four Hundred Thousand, One Hundred and Ten Dollars, 454 F.2d 1210 (3rd Cir 1972); Cert. denied 409 U.S. 894; McCall v. U.S., 338 F.2d 589 (9th Cir 1964), cert. denied 380 U.S. 974; Murphy v. Kodz, 351 F.2d 163 (9th Cir 1965)

in Florida required to administer Florida's Medicaid program, it was necessary to join the State as an indispensible party pursuant to Rule 19 F.R.C.P. Any other conclusion would lead to separate and cumbersome proceedings in a Federal Court against the Federal Government and redundant proceedings in a State Court action against the State. Such splitting of proceedings flies in the face of all modern needs for judicial economy and control and effectiveness of remedy. If however, this Court accepted the States' argument that this matter was subject to soley State court proceedings even when a federal regulation and a federal defendant are involved, the supremacy clause of the United States Constitution[6] would effectively be

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[6] United States Constitution Article VI

superseded by the Eleventh Amendment in that the Federal Government and its regulations effecting all fifty states would be at the mercy of a local state court. This can hardly be the intent of the adoption of the Eleventh Amendment.

This case is therefore uniquely distinguishable from Jordan v. Edelman, supra, since the central focus of the proceedings in that case was to review State conduct involving state officials. There was no juxtaposition of a federal cause of action with a federal party along with a state raising the issue of Eleventh Amendment immunity. In fact, the Petitioner has cited no cases where the Eleventh Amendment was raised as an issue when the federal government was named as an essential party along with a state defendant.

Furthermore, in Edelman, the award of damages granted by the lower court to the plaintiffs was undeniably retroactive in nature. In the case at bar, the payments sought are not retroactive but are in fact prospective under federal law. For a State plan to comply with the Order of the District Court of October 18, 1977, (and therefore Title 42 U.S.C. 1396(a)(13)(E)), the plan must provide for reasonable cost-related payments effective July 1, 1976. That is what the law expressly states and requires and any plan which is not effective as of that date would be in violation of the law and could not be approved by HHS by federal legislature mandate. It follows therefore that payment for the period of July 1, 1976 through October 17, 1977 is a necessary consequence of complying with Title 42 U.S.C. §1396(a)(13)(E) statutory law as well as the federal

District Court's Order and that such payment does not constitute retroactive relief. As such, neither the Eleventh Amendment nor this Court's holding in Edelman v. Jordan act as a bar to reasonable cost-related reimbursement as of July 1, 1976.

CONCLUSION

The Petitioner points out that "millions and millions of dollars are potentially involved." While this is true, this does not excuse the Petitioner from its unlawful conduct. Indeed, those millions of dollars are ones which the respondents have already spent upon their reliance that the State would comply with the law. Since the program in Florida is strictly cost oriented, only actual allowable costs, subject to audit, already spent by providers would be reimbursed.

There would be no windfall to anyone. In fact, it is worthy to note that the Federal Department of Health and Human Services' invalid delaying regulation which attempted to assist the States was promulgated and adopted only shortly after this Court made its ruling in Edelman v. Jordan. In this case, it was not only the State but the Federal Government, who pays over 50% of the Medicaid reimbursement, who teamed up to defeat the rights of providers under this Court's Edelman v. Jordan sanction. Certainly, HHS and the States had this Court's ruling in mind at the time. To rule now that the Respondents cannot maintain this action in Federal Court would have the ignoble effect of bringing to fruit Justice Thurgood Marshall's and Justice Harry Blackmun's opinion where in dissent Justice Marshall

stated his fear of, "the spectre of a State, perhaps voluntarily, defying Federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them." Edelman v. Jordan, supra, at 692, (1974)

Respectfully submitted,

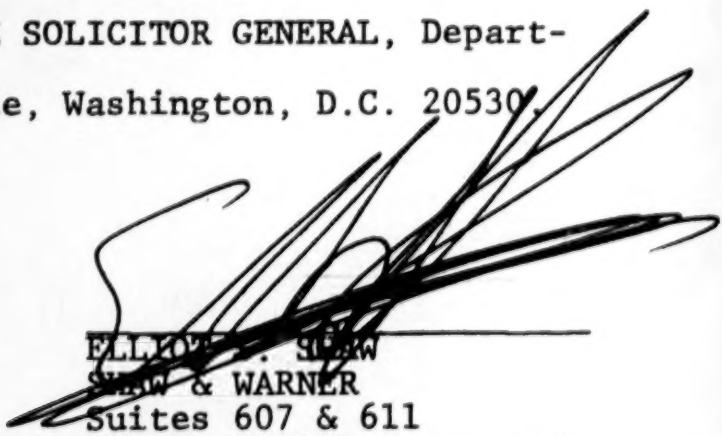
SHAW & WARNER
Suites 607 & 611
New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone (305) 374-2653

BY: _____
ELLIOT S. SHAW
Counsel for Respondents

On the brief:
Elliott S. Shaw
Eric P. Littman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of October, 1980, three copies of the Brief in Opposition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed to: M. STEPHEN TURNER, ESQ., P. O. Box 10261, 600 Lewis State Bank Bldg., Tallahassee, Fl., 32302; A. THOMAS MIHOK, ESQ., 5458 Woodcrest Drive, North Orlando, Fl., 32807; and THE SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.



ELLIOT H. SHAW
SHAW & WARNER
Suites 607 & 611
100 North Biscayne Blvd.
Miami, Florida 33132
Telephone: (305) 374-2633

Counsel for Respondents